Petition

Office-Supreme Court, U.S.
FILED
AUG 20 1981
ALEXANDER L. STEVAS,
CLERK

81-362

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

NO.

LOUIE L. WAINWRIGHT, SECRETARY,
FLORIDA DEPARTMENT OF
CORRECTIONS
Petitioner,

vs.

JOSE TORNA,
Respondent.

* *

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

* *

JIM SMITH
Attorney General
Tallahassee, Florida

STEVEN R. JACOB
Assistant Attorney General
Suite 820
401 N.W. 2nd Avenue
Miami, Florida 33128
(305) 377-5441

Counsel for Petitioner

QUESTION PRESENTED FOR REVIEW

WHETHER A STATE PRISONER CAN SEEK FEDERAL HABEAS CORPUS RELIEF BASED ON THE ALLEGED INEFFECTIVE ASSISTANCE OF RETAINED COUNSEL IN A DISCRETIONARY REVIEW PROCEEDING WHEN THE CONVICTION HAS BEEN REVIEWED AND AFFIRMED ON DIRECT APPEAL

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW..... i

TABLE OF CONTENTS..... ii

TABLE OF AUTHORITIES..... iv

PREFACE..... vi

OPINIONS BELOW..... 1

JURISICTIONAL STATEMENT..... 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED..... 3

STATEMENT OF THE CASE..... 7

REASONS FOR GRANTING THE WRIT..... 11

CONCLUSION..... 18

APPENDIX

Opinion of the United States Court of Appeals for the Fifth Circuit.....App.1-8

Opinion of the District Court of Appeal of Florida, Third District.....App.9-10

Order of the District Court of Appeal of Florida, Third District, Denying Rehearing.....App.11-12

Order of the Supreme Court of Florida Dismissing Petition for Writ of Certiorari.....App.13-14

Order of the Supreme Court of Florida Denying Rehearing...App.15

Order of the United States District Court for the Southern District of Florida Dismissing the Petition for Writ of Habeas Corpus.App.16-28

TABLE OF CONTENTS
CONTINUED

Page

Judgment of the United States
Court of Appeals for the
Fifth Circuit.....App.29-30

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Case	Page
Cuyler v. Sullivan, 446 U.S. 335 (1980).....	13,15
Edwards v. Louisiana, 520 F.2d 321 (5th Cir. 1975)...	12
Estelle v. Dorrough, 420 U.S. 534 (1975).....	11,12,15
Fitzgerald v. Estelle, 505 F.2d 1334 (5th Cir. 1974)..	11,12,15
Gilliam v. State, 267 So.2d 658 (Fla. 2d DCA 1972).....	16
Kallie v. Estelle, 518 F.2d 588 (5th Cir. 1975)...	12
Malone v. Alabama, 514 F.2d 77 (5th Cir. 1975)....	12
McKane v. Durston, 153 U.S. 684 (1894).....	15
Postel v. Beto, 508 F.2d 679 (5th Cir. 1975)...	12
Pressley v. Wainwright, 540 F.2d 818 (5th Cir. 1976), 430 U.S. 987 (1977).....	12-14
Pressley v. Wainwright, 367 So.2d 222 (Fla. 1979).....	12-14
Ross v. Moffitt, 417 U.S. 600 (1974).....	16-17

TABLE OF AUTHORITIES CONTINUED

Case	Page
Torna v. State, 358 So.2d 1109 (Fla. 3d DCA 1978)	1,8,10
Torna v. State, 362 So.2d 1057 (Fla. 1978)	1,8,10
Torna v. Wainwright, 649 F.2d 290 (5th Cir. 1981)	1,8,10

OTHER AUTHORITES

Title 28 United States Code 1254(1)	2
Constitution of the State of Florida Article V, Section 3(b)	3

FLORIDA STATUTES

Section 59.081, Florida Statutes (1977)	4

RULES

1977 Florida Rule of Appellate Procedure 9.120(a)(b)	4
Rule 9.030(a)(A)	4
Rule 9.030(a)(2)(A)	4

PREFACE

The petitioner, Louie L. Wainwright, Secretary, Florida Department of Offender Rehabilitation, was the appellee in the United States Court of Appeals for the Fifth Circuit and the respondent in the United States District Court for the Southern District of Florida. The respondent, Jose Torna, was the appellant in the Fifth Circuit Court of Appeals and the petitioner in the District Court. In this brief the parties will be referred to as they appear before this Court.

The symbol "A" will be used to designate the appendix which contains the portions of the record relevant to establishing jurisdiction in this Court.

OPINIONS BELOW

The opinion of the District Court of Appeal of Florida affirming the conviction is reported as Torna v. State, 358 So.2d 1109 (Fla. 3d DCA 1978).

The opinion of the Supreme Court of Florida dismissing the petition for a writ of certiorari is reported as Torna v. State, 362 So.2d 1057 (Fla. 1978).

The opinion of the United States District Court dismissing the petition for a writ of habeas corpus is not reported and is contained in the appendix

The opinion of the United States Court of Appeals to be reviewed is reported as Torna v. Wainwright, 649 F.2d 290 (5th Cir. 1981).

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Fifth Circuit was fendered on June 29, 1981. The jurisdiction of this Court is invoked pursuant to Title 28 United States Code 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article V, Section 3, paragraph (b), subsection (3) of the Constitution of the State of Florida, prior to its amendment in 1980, provided:

(b) JURISDICTION.- The supreme court:

* * * *

(3) May review by certiorari any decision of a district court of appeal that affects a class of constitutional or state officers, that passes upon a question certified by a district court of appeal to be of great public interest, or that is in direct conflict with a decision of any district court of appeal or of the supreme court on the same question of law, and any interlocutory order passing upon a matter which upon final judgment would be directly appealable to the supreme court; and may issue writs of certiorari to commissions established by general law having statewide jurisdiction.

1977 Florida Rule of Appellate Procedure 9.120(a)(b) provides:

Rule 9.120. CERTIORARI PROCEEDINGS TO REVIEW ORDERS OF DISTRICT COURT OF APPEAL

(a) Applicability. This rule applies to those proceedings which invoke the certiorari juriddiction of the Supreme Court described in Rule 9.030(a)(A).

(b) Commencement. The jurisdiction of the Supreme Court described in Rule 9.030(a)(2)(A) shall be invoked by filing two copies of a notice, accompanied by the filing fees prescribed by law, with the clerk of the district court of appeal within 30 days of rendition of the order to be reviewed.

Section 59.081, Florida Statutes (1977), provides:

59.081 Time for invoking appellate jurisdiction of any court.-

(1) The time within which and the method by which the jurisdiction of any

court in this state possessed of power to review the action of any other court, commission, officer or bureau may be invoked by appeal, certiorari, petition for review or other process by whatever name designated, and the manner of computing such time shall be prescribed by rule of the supreme court.

(2) Failure to invoke the jurisdiction of any such court within the time prescribed by such rules shall divest such court of jurisdiction to review such cause.

Amendment VI of the Constitution of the United States provides that:

In all criminal prosecutions, the accused shall enjoy the right.....to have the assistance of counsel for his defense.

Amendment XIV, Section 1 of the Constitution of the United States provides that:

***[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to

any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The respondent was charged by information filed in the Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Florida, on June 24, 1976, with seven counts of attempted murder, one count of unlawful possession of a firearm while engaged in a criminal offense, one count of unlawful possession of cannabis, and two counts of possession of a controlled substance. He was found guilty of three counts of attempted manslaughter, four counts of attempted second degree murder, and the remaining counts as charged by verdict of a jury rendered on December 16, 1976. He was adjudicated guilty by the Honorable Leonard Rivkind, Judge of the Eleventh Judicial Circuit of Florida, in and for Dade County, Florida, on December 16, 1976. He was sentenced by the same Judge to 5 years imprisonment on Counts I through III; 30 years on Counts IV through VII of which 15 years are to be spent in prison concurrently with the sentences on Counts I through III and 15 years are to be withheld so that the respondent may be placed on probation for 5 years; 15

years imprisonment on Count VIII to run concurrently with the sentences on Counts I through VII; 5 years imprisonment on Counts IX through XI to run concurrently with the sentences on Counts I through VIII, being ineligible for parole until 3 years have been served and was given credit for 116 days served in the Dade County Jail prior to sentencing on February 10, 1977.

The respondent filed a notice of appeal in the District Court of Appeal, Third District, on February 10, 1977, claiming a denial of his right to a speedy trial pursuant to Rule 3.191, Florida Rules of Criminal Procedure, that his motion to suppress was improperly denied and that the search warrant was insufficient and improperly executed. The trial court's rulings were affirmed. Torna v. State, 358 So.2d 1109 (Fla. 3d DCA 1978).

The respondent filed an untimely notice of certiorari. The cause was dismissed. Torna v. State, 362 So.2d 1057 (Fla. 1978). He filed a motion for rehearing and clarification which was denied on

September 11, 1978.

On March 19, 1979 he filed a petition for a writ of habeas corpus in the United States District Court, Southern District of Florida pursuant to 28 United States Code 2254.

He alleged that he was denied the right to speedy trial under Florida law. He did not allege the violation of any federal constitutional right.

Secondly he claimed that he was denied the "right" to certiorari review in the Florida Supreme Court. This issue had only been considered in the state courts by virtue of his motion for rehearing and clarification in the Florida Supreme Court once it dismissed his notice of certiorari as being untimely. He did not allege the deprivation of any federal right in his federal petition.

Thirdly he alleged the ineffectiveness of retained counsel for filing the notice untimely. This issue was raised for the first time in the habeas petition. Presumably the claim was based on Amend-

ment VI of the Constitution of the United States. The district court ruled that it would have been futile to raise the issue in the state courts because Florida did not recognize claims related to the ineffective assistance of retained counsel.

The petition was dismissed. The Florida speedy trial claim was not cognizable in a federal habeas petition. The denial of the right to appeal and to the effective assistance of counsel did not deprive Torna of due process because there was no state action.

An appeal was taken to the United States Court of Appeals for the Fifth Circuit. Briefs were filed. The petitioner moved to disqualify Torna's counsel for raising his own ineffectiveness. Counsel was disqualified and new counsel was retained. The case was rebriefed.

The sole issue ultimately raised in the Fifth Circuit was the ineffective assistance of counsel for failing to timely file the notice of certiorari in the Florida Supreme Court. The dismissal of the petition was reversed.

REASONS FOR GRANTING THE WRIT

In Fitzgerald v. Estelle, 505 F.2d 1334 (5th Cir. 1974), the Fifth Circuit established different standards for evaluating the effective asistance of retained counsel compared to appointed counsel when considering a state prisoner's federal habeas petition. In order to contend that the actions of privately retained counsel were so ineffective as to be in violation of the Constitution, a habeas corpus petition had to demonstrate that counsel's actions were so grossly deficient as to render the proceedings fundamentally unfair.

> Moving from the Fourteenth Amendment alone to the incorporated Sixth, our decisions establish that the standard of reasonably effective assistance of counsel, most recently delineated in Herring v. Estelle, 491 F.2d 125 (5th Cir. 1974), covers a greater range of counsel errors than does the fundamental fairness standard of the due process concept solely embodied within the Fourteenth Amendment. The circumstances in which the state will be bound

> by retained counsel's failure to meet the Sixth Amendment standard of effectiveness (when resulting trial cannot be characterized as fundamentally unfair), must be assessed more strictly lest we place a procedurally intolerable and practically impossible burden upon trial judges, who have no control over the selection of counsel employed by a defendant. Id. at 1336.

Although Fitzgerald dealt with trial counsel, this standard was subsequently applied to situations where retained counsel failed to file a timely appeal. Ineffective assistance of counsel resulting in the total deprivation of an appeal was not sufficient to constitute fundamental unfairness. Edwards v. Louisiana, 520 F.2d 321 (5th Cir. 1975); Kallie v. Estelle, 518 F.2d 588 (5th Cir. 1975); Malone v. Alabama, 514 F.2d 77 (5th Cir. 1975); Postel v. Beto, 508 F.2d 679 (5th Cir. 1975). However, when counsel was appointed, his failure to timely file a petition for certiorari did entitle the prisoner to relief. Pressley v. Wainwright, 540 F.2d 818 (5th Cir. 1976), cert denied, 430 U.S. 987 (1977); see also Pressley v. Wainwright,

367 So.2d 222 (Fla. 1979).

In Cuyler v. Sullivan, 446 U.S. 335 (1980), this Court reaffirmed that a state prisoner must show the existance of state action in order to recieve federal habeas corpus relief. This Court held that state action is inherent in a state criminal trial because it is initiated and conducted by the State itself. Therefore there was no basis for drawing a distinction between retained and appointed counsel at the trial level.

In the instant case the Fifth Circuit held, based on Cuyler v. Sullivan, supra, that there is no distinction between appointed and retained counsel in the evaluation of a claim of ineffective assistance in a certiorari review proceeding. Following Pressley v. Wainwright, supra, where counsel was appointed, the court concluded that the respondent was entitled to relief even though counsel was retained.

Initially the petitioner would argue that Pressley was incorrectly decided.

The Florida Supreme Court granted Pressley a belated application for certiorari review. Pressley v. Wainwright, 367 So.2d 222 (Fla. 1979). Mr. Justice England dissented and would have allowed the federal court to assume the responsibility for the consequence it had threatened, that is, Pressley's release from custody. The dissent was based on the contention that there was no federal constitutional right involved.

> Ross v. Moffitt, 417 U.S. 600, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974), stands squarely for the proposition that there is no constitutional right to counsel for purposes of seeking discretionary certiorari review either in a court like ours or in the United States Supreme Court. If the right to counsel is not guaranteed, I fail to comprehend how a procedural omission of counsel has become a constitutional right.
>
> Id., at 224

In other words, in a certiorari review proceeding, if there is no consti-

tutional right to counsel, then there is no constitutional right to effective counsel.

Even if there is a federal constitutional right to counsel in a discretionary review proceeding, state action is not inherent in that proceeding. The respondent was tried in a proceeding which was initiated and conducted by the State. State action was inherent in that proceeding. Cuyler v. Sullivan, supra.

However, the respondent was given a direct appeal in the state courts. He initiated the proceeding and was given the opportunity to upset the prior determination of guilt. The State did not have to provide any appeal at all. McKane v. Durston, 153 U.S. 684 (1894); Estelle v. Dorrough, 420 U.S. 534 (1975). State action should not be considered inherent in a direct appeal proceeding which is initiated by the convicted individual.

This Court does not have to decide to what extent state action, inherent at trial, is present in a direct appeal proceeding. The instant case deals with a

situation which is even further removed from the trial proceeding than a direct appeal.

In Florida, appeal as of right is limited to one appeal, and the Supreme Court of Florida in the exercise of conflict jurisdiction plays a harmonizing, not a corrective, role. Gilliam v. State, 267 So.2d 658 (Fla. 2d DCA 1972). The Florida Supreme Court could have denied certiorari even if it believed the decision of the district court of appeal to be incorrect. Because the purpose of the proceeding is not to adjudicate the merits of the prisoner's claim, but rather to harmonize the jurisprudence in the state, the state action inherent at trial should not be extended to a post-conviction, post-appellate, discretionary review proceeding.

The respondent may argue that state action is inherent in a discretionary review proceeding because a prisoner would not have to seek discretionary review but for the initial prosecution and conviction. A similar argument was presented and rejected in Ross v. Moffitt, 417 U.S.

600 (1974).

In Ross v. Moffitt, supra, a state prisoner argued that he had the right to counsel in certiorari proceedings in the state Supreme Court and in this Court. This Court stated:

> The suggestion that a State is responsible for providing counsel to one petitioning this Court simply because it initiated the prosecution which led to the judgment sought to be reviewed is unsupported by either reason or authority.

Id., at 617

Similarly, a certiorari review proceeding, by its very nature, is so attenuated from the initial prosecution, that any state action inherent at the trial level is dissipated by the time the case is presented for certiorari review.

CONCLUSION

There is no federal constitutional right to counsel in a discretionary review proceeding, therefore there is no constitutional right to effective counsel in a discretionary review proceeding. Even if there is a constitutional right to effective counsel on discretionary review, there is no state action present where counsel is retained. Without state action a state prisoner cannot win federal habeas corpus relief. Because of the importance of the question presented, the petitioner respectfully requests that this petition for writ of certiorari be granted.

Respectfully submitted,

Jim Smith
Attorney General of
the State of Florida

STEVEN R. JACOB
Assistant Attorney
General

Appendix

Jose TORNA, Petitioner-Appellant,

v.

Louie L. WAINWRIGHT, Secretary, Department of Offender Rehabilitation, Respondent-Appellee.

No. 79-3140.

United States Court of Appeals, Fifth Circuit.

Unit B

June 29, 1981.

Appeal from the United States District Court for the Southern District of Florida.

Before MILLER*, and FRANK M. JOHNSON, Jr., and THOMAS A. CLARK, Circuit Judges.

PER CURIAM:

Jose R. Torna filed a petition for habeas corpus under 28 U.S.C.A. § 2254 attacking a sentence of fifteen years that was imposed by the Circuit Court of the Eleventh Judicial Circuit, Dade County, Florida. The petitioner is currently in the custody of the defendant Wainwright pursuant to that sentence.

Torna advances several grounds for relief. We decide only one, viz, denial of his right to effective assistance of counsel because his retained counsel failed to file a timely petition for writ of certiorari to the Florida Supreme Court.

The record reflects that Torna appealed directly from his conviction to the Third District Court of Appeals for the State of Florida. That court affirmed. Torna v. State, 358 So.2d 1109 (Fla. 3d DCA 1978). Torna then attempted to invoke the jurisdiction of the Supreme Court of Florida by application for a writ of certiorari. The retained counsel failed to timely file the application and the Supreme Court dismissed for lack of jurisdiction. Torna v. State, 362 So.2d 1057 (Fla. 1978).

The United States District Court for the Southern District of Florida dismissed Torna's application for the writ of habeas corpus, ruling, as to the issue involving the alleged denial of effective assistance of counsel, (1) that no ground for federal relief was presented and (2) that under

a "fundamental fairness" standard applicable to the conduct of privately retained counsel, the failure to timely file a notice for certiorari did not constitute ineffective assistance of counsel. The district court found no deprivation of a "right to appeal."

As stated, on this appeal Torna challenges the denial of habeas relief on the ground that he was denied his constitutional right to the effective assistance of counsel under the Sixth and Fourteenth Amendments.

[1,2] While the district court was correct in observing that a violation of state procedural law, by itself, is not a proper subject for federal habeas corpus review, see Davis v. Wainwright, 547 F.2d 261, 264 (5th Cir. 1977); Pringle v. Beto, 424 F.2d 515 (5th Cir. 1970), we cannot agree with the holding of the district court that Torna was not denied the effective assistance of counsel in violation of the Sixth and Fourteenth Amendments.

The district court proceeded on the basis, justified by then existing precedent, that the effectiveness of court-appointed and privately retained counsel was subject to consideration under different standards. On one hand, the failure of court-appointed counsel to file a timely notice of certiorari in the Florida Supreme Court has been held to constitute ineffective assistance. Pressley v. Wainwright, 540 F.2d 818, 820 (5th Cir. 1976), cert. denied, 430 U.S. 987, 97 S.Ct. 1688, 52 L.Ed.2d 383 (1977). On the other hand, this court in Edwards v. Louisiana, 520 F.2d 321, 322 (5th Cir. 1975), cert. denied, 423 U.S. 1089, 96 S.Ct. 882, 47 L.Ed.2d 100 (1976), held that "failure of retained counsel to adequately inform a defendant of his right to appeal ..... without more, does not so involve the state in the abridgment of the defendant's rights as to constitute a Fourteenth Amendment violation". The Edwards result was reached under the standard for evaluating the effectiveness of retained counsel enunciated by the en banc Court, Fitzgerald v. Estelle, 505 F.2d 1334, 1336 (5th Cir. 1974), cert. denied, 422 U.S. 1011, 95

S.Ct. 2636, 45 L.Ed.2d 675 (1975), which held that a habeas corpus petitioner must demonstrate that the actions of retained counsel were so grossly deficient as to render the proceedings "fundamentally unfair." The Fitzgerald Court was reluctant to apply the "greater range" of the Sixth Amendment right to effective assistance to actions of retained counsel, feeling that in the ordinary case the necessary "state action" ingredient was tenuous; no such problem was found to exist where counsel were appointed by the state. Id. at 1336-37.

We are compelled by the recent decision of the Supreme Court to apply the rule of Pressley. In Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980), the Court stated:

> Our decisions make clear that inadequate assistance does not satisfy the Sixth Amendment right to counsel made applicable to the States through the Fourteenth Amendment. A guilty plea is open to attack on the ground that counsel did not provide the defendant with "reasonable competent advice." McMann v.

Richardson, 397 U.S. 759, 770-771 [90 S.Ct. 1441, 1448-1449, 25 L.Ed.2d 763] (1970); see Tollett v. Henderson, 411 U.S. 258, 267 [93 S.Ct. 1602, 1608, 36 L.Ed.2d 235] (1973). Furthermore, court procedures that restrict a lawyer's tactical decision to put the defendant on the stand unconstitutionally abridge the right to counsel. Brooks v. Tennessee, 406 U.S. 605, 612-613 [92 S.Ct. 1891, 1895, 32 L.Ed.2d 358] (1972) (requiring defendant to be first defense witness); Ferguson v. Georgia, 365 U.S. 570, 593-596 [81 S.Ct. 756, 768-770, 5 L.Ed.2d 783] (1961) (prohibiting direct examination of defendant). See also Geders v. United States, 425 U.S. 80 [96 S.Ct. 1330, 47 L.Ed.2d 592] (1976); Herring v. New York, 422 U.S. 853 [95 S.Ct. 2550, 45 L.Ed. 2d 593] (1975). Thus the Sixth Amendment does more than require the States to appoint counsel for indigent defendants. The right to counsel prevents the States from conducting trials at which persons who face incarceration must defend themselves without adequate legal assistance.

A proper respect for the Sixth Amendment disarms petitioner's contention that

> defendants who retain their own lawyers are entitled to less protection than defendants for whom the State appoints counsel. We may assume with confidence that most counsel, whether retained or appointed, will protect the rights of an accused. But experience teaches that, in some cases, retained counsel will not provide adequate representation. The vital guarantee of the Sixth Amendment would stand for little if the often uninformed decision to retain a particular lawyer could reduce or forfeit the defendant's entitlement to constitutional protection. Since the State's conduct of a criminal trial itself implicates the State in the defendant's conviction, we see no basis for drawing a distinction between retained and appointed counsel that would deny equal justice to defendants who must choose their own lawyers.

Id. at 344-45, 100 S.Ct. 1708, 1716 (footnotes omitted). Thus the Supreme Court has made clear there is no distinction between court-appointed and privately retained counsel in the evaluation of a claim of ineffective assistance.

At the time of the decision in Cuyler, the decision of this Court in Perez v. Wainwright, 594 F.2d 159 (5th Cir. 1979), was pending on writ of certiorari. The Supreme Court vacated Perez and remanded it for reconsideration in the light of Cuyler. 447 U.S. 932, 100 S.Ct. 3032 65 L.Ed.2d 1127 (1980). The most recent chapter in Perez was the opinion on petition for rehearing, 640 F.2d 596 (5th Cir. 1981), where the panel reiterated its prior holding that"... when a lawyer ... does not perform his promise to his client that an appeal will be taken, fairness requires that the deceived defendant be granted an out-of-time appeal." Perez v. Wainwright, 594 F.2d at 163. The rehearing panel in Perez further held that an out-of-time appeal should be granted without any showing by petitioner than an issue of "arguable merit will be raised in state court." Perez v. Wainwright, supra, 640 F.2d at 598.

Accordingly, we REVERSE the district court's denial of the writ of habeas corpus and REMAND to the district court for further proceedings consistent with this opinion.

Jose R. TORNA, Appellant

v.

The STATE of Florida, Appellee.

No. 77-375.

District Court of Appeal of Florida,

Third District.

April 25, 1978.

Appeal from Circuit Court, Dade County;

Leonard Rivkind, Judge.

Whitman, Wolfe & Gross and Donald F. Frost, Miami, for appellant.

Robert L. Shevin, Atty. Gen. and Jose R. Rodriguez and Steven R. Jacob, Asst. Attys. Gen., for appellee.

Before KEHOE, J., and BOYD, JOSEPH A. Jr., Associate Judge and CHARLES CARROLL (Ret.), Associate Judge.

PER CURIAM.

Affirmed. See, e.g., State ex rel. Butler v. Cullen, 253 So.2d 861 (Fla. 1971); Jester v. State, 339 So.2d 242 (Fla. 3d DCA 1976); Crawford v. State, 334 So.2d 141 (Fla. 3d DCA 1976); Wigfall v. State, 323 So.2d 587 (Fla. 3d DCA 1975); Rosenwasser v. Smith, 308 So.2d 600 (Fla.

3d DCA 1975); Section 933.09, Florida Statutes (1975); and Fla.R.Crim.P. 3.190.

IN THE DISTRICT COURT
OF APPEAL OF FLORIDA
THIRD DISTRICT
JANUARY TERM, A.D. 1978
THURSDAY, JUNE 15, 1978

CASE NO. 77-375

JOSE R. TORNA,
Appellant,

vs.

THE STATE OF FLORIDA,
Appellee.

Counsel for appellant having filed in this cause petition for rehearing, and same having been considered by the court which determined the cause, it is ordered that said petition be and it is hereby denied.

A True Copy

ATTEST:

[Signature illegible]

Clerk District Court
of Appeal, Third
District

cc: Donald Frost
Robert L. Shevin
/plc

(THE MANDATE IN THE ABOVE STYLED CAUSE HAS TODAY BEEN ISSUED AND MAILED TO THE CLERK OF THE CIRCUIT COURT IN AND FOR DADE COUNTY, FLORIDA)

SUPREME COURT OF FLORIDA
WEDNESDAY, JULY 26, 1978

CASE NO. 54,677
District Court of Appeal,
3d District - No. 77-375
JOSE R. TORNA,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

It appearing to the Court that the notice was not timely filed, it is ordered that the cause is hereby dismissed sua sponte, subject to reinstatement if timeliness is established on proper motion filed within fifteen days from the date of this order. See Fla.R.App.P.9.120.

A True Copy
TEST:
Sid J. White
Clerk Supreme Court.
by: Judy Whittle
Deputy Clerk

W
CC: Hon. Louis J. Spallone, Clerk

Hon. Richard P.
Brinker, Clerk
Hon. Leonard
Rivkind, Judge

Donald F. Frost
Esquire
Robert L. Shevin,
Esquire

IN THE SUPREME COURT OF FLORIDA
MONDAY, SEPTEMBER 11, 1978

CASE NO. 54,677

District Court of Appeal,
3d District - No. 77-375

JOSE R. TORNA,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

On consideration of the motion for rehearing and clarification filed by attorney for petitioner,

IT IS ORDERED by the Court that said motion be and the same is hereby denied.

A True Copy

TEST:

Sid J. White
Clerk Supreme Court

by: [Signature illegible]
Deputy Clerk

C
cc: Hon. Louis J. Spallone, Clerk
Hon. Richard P. Brinker, Clerk
Hon. Leonard Rivkind, Judge
Donald F.Frost, Esquire
Hon. Robert L. Shevin

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 79-1480 CIV -JE

ORDER OF DISMISSAL

JOSE R. TORNA,
Petitioner,

vs.

LOUIE L. WAINWRIGHT, Secretary,
Department of Offender
Rehabilitation,
Respondent.

Jose R. Torna has filed a petition for habeas corpus under 28 U.S.C. Section 2254 attacking a sentence of fifteen (15) years imposed by the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida. Sentence was imposed following the conviction of Petitioner for three counts of atttempted manslaughter, four counts of attempted second degree murder, two counts of possession of controlled substances, and one count each of unlawful possession of cannabis, and unlawful possession of a firearm while engaged in a criminal offense.

Petitioner is currently in the custody of Louie L. Wainwright, Secretary of Department of Offender Rehabilitation

for the State of Florida. The name of Mr. Wainwright has been substituted as the proper party Respondent.

As grounds entitling him to relief, Petitioner alleges:

1. Denial of his right to speedy trial because trial was not conducted within the time period specified by Florida Rule of Criminal Procedure 3.191.

2. Denial of his right to effective assistance of counsel because the office of his retained counsel failed to file a timely petition for writ of certiorari to the Florida Supreme Court.

3. Denial of the right to take an appeal because of the above described failure to timely petition for certiorari.

Review of the record indicates that Petitioner directly appealed from his conviction to the Third District Court of Appeal for the State of Florida raising, inter alia, the claim as to violation of Florida Rule 3.191. A later petition

for certiorari to the Florida Supreme Court was dismissed as untimely. Petitioner states that in this action, he alleged violation of the right to speedy trial as mandated by the Florida and Federal Constitutions as well as Rule 3.191. A later petition for rehearing was denied by the Florida Supreme Court on September 18, 1978.

In his Answer and Memorandum of Law, Respondent alleges that Petitioner had failed to exhaust his state judicial remedies because he now only claims a denial of the state procedural rule and only argued the state rule before the district court of appeal. In addition, Respondent contends that Petitioner should have raised his claims regarding frustration of appeal and denial of effective assistance of counsel with the Supreme Court through the use of a petition for writ of hebeas corpus to seek belated certiorari review. Finally, Respondent maintains that on the merits, Petitioner has not stated a constitutional claim which would entitle him to habeas corpus relief.

With respect to his issue concerning speedy trial, Petitioner in both the instant petition and his brief before the Third District Court bases his argument solely upon the application of Rule 3.191. He does not contend that Petitioner was also deprived of the right to speedy trial as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.

Violation of a state created right is not a ground for federal habeas corpus relief. Rose v. Hodges, 423 U.S. 19 (1975). Federal courts are without jurisdiction to review a habeas corpus petition which is grounded solely upon the alleged violation of state law but does not claim the denial of a federal constitutional right. Pringle v. Beto, 424 F.2d 515 (5th Cir. 1970). The Supreme Court of the United States has expressly held that the federal constitutional right to speedy trial is not to be determined by reference to a fixed standard.

> "it is, for example, impossible to determine with percision when that right has been denied. We cannot

> definitely say how long is too long in a system where justice is supposed to be swift but deliberate."

Barker v. Wingo, 407 U.S. 514, 522, 92 S.Ct. 218 2, 2187 (1972). In so ruling the Court recognized that rigid procedural time frames have been adopted by certain states but declined to adopt such a test at the federal constitutional level.

> "(S)uch a result would require this Court to engage in legislative rulemaking activity, rather then in the adjudicative process to which we should confine our efforts. We do not establish procedural rules for the states except when mandated by the Constitution. We find, no constitutional basis for holding that the speedy trial right can be quantified into a specified number of days or months. The States, of course, are free to prescribe a reasonable period consistent with constitutional standards, but our approach must be less precise."

Id. at 407 U.S. 523 and 92 S.Ct. 2188. In following the lead of the Su-

preme Court, the Fifth Circuit has held that possible violation of the Florida Rule of Criminal Procedure 3.191 requiring trial within 180 days of arrest constituted merely a violation of the state procedural rules which did not affect the fundamental fairness of Petitioner's conviction. By itself therefore, a violation of the rule was not a proper subject for federal habeas corpus review. Davis v. Wainwright, 547 F.2d 261 (5th Cir. 1977).

Petitioner does, as has been noted above, claim to have raised a federal constitutional issue in his petition for certiorari to the Florida Supreme Court. However, that Court never considered the matter on the merits due to the untimely filing of the petition.

Petitioner was not required to seek collateral relief on his claim concerning the alleged ineffectiveness of retained counsel. It has long been the view of the Florida State Courts that the allegation of ineffective privately retained counsel does not present a cognizable federal constitutional claim,

despite the pronouncement of federal courts to the contrary. Therefore, the presentation of such a claim in the state courts is a futile effort and the Fifth Circuit has thus held that in such cases, the petitioner need not seek any collateral relief before having his claim heard by the federal court. United States ex. rel.Reis v. Wainwright, 525 F.2d 1269 (5th Cir. 1976); Perez v. Wainwright, 594 F.2d 159 (5th Cir. 1979).

In order to contend that the actions of privately retained counsel were so ineffective as to be in violation of the Constitution, a habeas corpus petitioner must demonstrate that his actions were so grossly deficient as to render the proceedings fundamentally unfair.

> "Whenever a defendant has been convicted as the result of such a gross malfunction, the result is that the state's criminal justice system has operated to deny due process. Requisite Fourteenth Amendment state action is present, not because a state official knew the particulars of the unfairness or because retained counsel

> is deemed a state official, but because the system has failed, and the state's consequent imprisonment or fine of the defendant is fundamentally wrong. In the same manner, whenever a lawyer's ineffectiveness has rendered a trial fundamentally unfair, whether he be retained, or appointed and whether his action or inaction was known or unknown to state trial officials, a deprivation of Fourteenth Amendment due process results from enforcement of the resultant judgment.

Fitzgerald v. Estelle, 505 F.2d 1334, 1336 (5th Cir. 1974). By contrast, appointed counsel is judged to be constitutionally adequate where the quality of representation provided has not been "reasonably effective". In the latter instance, a greater range of possible errors are included.

> Moving from the Fourteenth Amendment alone to the incorporated Sixth, our decisions

> establish that the standard of reasonably effective assistance of counsel, most recently delineated in Herring v. Estelle, 491 F.2d 125 (5th Cir. 1974), covers a greater range of counsel errors than does the fundamental fairness standard of the due process concept solely embodied within the Fourteenth Amendment. The circumstances in which the state will be bound by retained counsel's failure to meet the Sixth Amendment standard of effectiveness (when resulting trial cannot be characterized as fundamentally unfair), must be assessed more strictly lest we place a procedurally intolerable and practically impossible burden upon trial judges, who have no control over the selection of counsel employed by a defendant. Id.

Fitzgerald v. Estelle, specifically concerned itself only with errors committed by counsel at trial. However, the standards first set forth in that case were later specifically applied to the instance where retained counsel has failed

to file a timely appeal.

Postel v. Beto, 508 F.2d (5th Cir. 1975). The Fifth Circuit soon afterwards was confronted with cases which enabled it further to define the extent of protection afforded by the fundamental fairness standard against errors made by privately retained appellate counsel. In Edwards v. Louisiana, 520 F.2d 321 (5th Cir. 1975), it ruled that:

> "(F)ailure of retained counsel to inform a defendant of his right to appeal or to proceed with such an appeal once it is requested by a defendant, without more, does not involve the state in the abridgement of the defendant's rights so as to constitute a Fourteenth Amendment violation."

Id. at 322. See also Malone v. Alabama, 514 F.2d 77 (5th Cir. 1975); Kalie v. Estelle, 515 F.2d 588 (5th Cir. 1975). Quite recently, this principle of law was again retiterated. Perez v. Wainwright, supra,. In Pressley v. Wainwright, 540 F.2d 818 (5th Cir. 1976), the Fifth Circuit did hold that failure

to file a timely petition for certiorari by court appointed counsel resulted in the denial of effective assistance of counsel. However, Pressley is distinguishable from the instant case because the Pressley Court was not bound by the fundamental fairness standard which governs cases involving retained counsel.

The question of whether or not Petitioner has exhausted his state judicial remedies with respect to his claim of frustration of appeal is somewhat more complex. Under Florida law, a defendant who has not filed a timely appeal can file a writ of habeas corpus to seek belated appeal from the appropriate appellate court. Baggett v. Wainwright, 229 So.2d 239 (Fla. 1969). Furthermore, the Florida Supreme Court has recently granted motions for leave to apply belatedly for certiorari review. Pressley v. Wainwright, 367 So.2d 222 (Fla. 1979). While Petitioner did file a motion for rehearing with the Supreme Court, he did not follow those procedures expressley authorized by Baggett, supra, or Pressley, supra,.

Even assuming that Petitioner has properly exhausted his state remedies with respect to his contention regarding frustration of appeal, he still has not stated a claim which would entitle him to habeas corpus relief. In Malone v. Alabama, supra, the Fifth Circuit held that the failure of retained counsel to prosecute an appeal did not deprive the petitioner of his right to appeal. In reaching this decision, the Court noted that the Petitioner was not prevented from filing an appeal due to any acts or omissions on the part of the State. In the instant case, the circumstances are even more compelling than in Malone. Under Florida law, a criminal defendant who has been convicted of a felony has the absolute right to take an appeal to an intermediate appellate court. Fla. Const. Art.V Sections 3(b), 4(b)(1); 23 Fla. Stat. Ann. Sections 924.05, 924.06 and 924.08. The Supreme Court of Florida, on the other hand, has the discretion to grant a writ of certiorari in only certain limited instances. Fla. Const. Art. V, Section 3(b). Petitioner did appeal from his conviction to the Third District

Court. Failure of counsel to timely petition for certiorari to the Supreme Court, therefore, only prevented him from applying for further discretionary review.

For the above reasons, it is therefore

ORDERED AND ADJUDGED that the instant petition be DISMISSED.

DONE AND ORDERED at Miami, Florida this 25th day of June, 1979.

[Signature illegible]
UNITED STATES DISTRICT JUDGE

cc: Donald F. Frost, Esquire.
26 S.W. 6 Street,
Miami, Florida
33130

Mr. Jose R. Torna
#058407
Glades Correctional Institution
Belle Glade,
Florida

Steven R. Jacob, Esq.
Assistant Attorney General
401 N.W. 2nd Ave., Suite 820
Miami, Florida
33128

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 79-3140

D. C. DOCKET NO. CA 68-1480-JE

JOSE R. TORNA,
Petitioner-Appellant,

versus

LOUIE L. WAINWRIGHT, Secretary
Department of Offender
Rehabilitation,
Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Florida

---

Before MILLER,* and FRANK M. JOHNSON, Jr. and THOMAS A. CLARK, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the order of the District Court appealed from in this cause be and the same is hereby reversed; and that this cause be, and the same is hereby remanded to the said District Court for further proceedings in accordance with the opinion of this Court.

June 29, 1981

A True Copy
ATTESTED:
Clerk, U.S. Court of
Appeals, Fifth Circuit
by: K. Smith
Deputy Clerk
Atlanta, Ga.

ISSUED AS MANDATE:

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition for Writ of Certiorari was furnished by mail to GEOFFREY C. FLECK, Esq., Attorney for Appellant/Petitioner, 444 Brickell Avenue, Suite 700, Miami, Florida 33131 and JOSE R. TORNA, # 058407, Glades Correctional Institute, Belle Glade, Florida, on this _____ day of August, 1981.

STEVEN R. JACOB
Assistant Attorney General

Opposition

RECEIVED
OCT 16 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO: 81-362

LOUIE L. WAINWRIGHT, Secretary,
Florida Department of Corrections,

Petitioner,

-vs-

JOSE TORNA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT ON JURISDICTION

GEOFFREY C. FLECK, ESQUIRE
WEINER, ROBBINS, TUNKEY & ROSS, P.A.
Rivergate Plaza, Suite 700
444 Brickell Avenue
Miami, Florida 33131
Telephone: (305) 373-0110
Counsel for Respondent

TABLES OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
PREFACE	1
REASONS FOR DENYING THE WRIT	2
CONCLUSION	5
CERTIFICATE OF SERVICE	6

TABLE OF AUTHORITIES

PAGE(S)

Cuyler v. Sullivan,
446 U.S. 335 (1980) 2, 3

Fay v. Noia,
372 U.S. 391 (1963) 2

Fitzgerald v. Estelle,
505 F.2d 1334 (5th Cir. 1974) 2

Pressley v. Wainwright,
540 F.2d 818, 820 (5th Cir. 1976)
cert. denied, 430 U.S. 987, 97 S.Ct. 1688,
52 L.Ed.2d 383 (1977) 2, 3

Rice v. Sioux City Memorial Parks Cemetary,
349 U.S. 70 (1955) 2

Ross v. Moffitt,
417 U.S. 600 (1974) 2

OTHER AUTHORITIES

Title 28, U.S.C. 1254(1) 2

PREFACE

The Petitioner, Louie L. Wainwright, Secretary, Florida Department of Corrections, was the Appellee in the United States Court of Appeals for the Fifth Circuit. The Respondent, Jose Torna, was the Appellant in the Fifth Circuit Court of Appeals. In this brief, the parties will be referred to as they appear before this Court.

The symbol "App" will be used to designate portions of the Appendix filed with the Petitioner's brief. Pursuant to U.S. Sup.Ct. Rule 34, the Respondent accepts the statement of the case, opinions below, constitutional and statutory provisions involved, and the question presented for review as stated by the Petitioner.

This response follows.

WEINER, ROBBINS, TUNKEY & ROSS, P.A., ATTORNEYS AT LAW
RIVERGATE PLAZA, SUITE 700, 444 BRICKELL AVENUE, MIAMI, FLORIDA 33131 • (305) 373-0110

REASONS FOR DENYING THE WRIT

The Petitioner seeks to invoke the Certiorari jurisdiction of this Court pursuant to Title 28, U.S.C., §1254(1). A review on Writ of Certiorari, however, is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. U.S. Sup.Ct. Rule 17; Fay v. Noia, 372 U.S. 391 (1963). The "special and imporant reasons" contemplated by the rule relate to problems beyond the academic or episodic and those which reach constitutional dimensions. Certiorari should not be granted except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Courts. Rice v. Sioux City Memorial Parks Cemetary, 349 U.S. 70 (1955).

This case satisfies none of the criteria established for invoking this Court's jurisdiction. Only a minuscule number of criminal defendants can be effected by it. It creates absolutely no conflict of precedent and is, in fact, entirely consistent and expressly in accord with this Court's recent decision in Cuyler v. Sullivan, 446 U.S. 335 (1980). In challenge of the decision of the Fifth Circuit Court of Appeals, the Petitioner relies primarily and most dependently upon the archaic rule of Fitzgerald v. Estelle, 505 F.2d 1334 (5th Cir. 1974) and the totally inapposite holding of this Court in Ross v. Moffitt, 417 U.S. 600 (1974). The Fitzgerald Court held that different standards apply for evaluating the effective assistance of retained counsel compared to appointed counsel. In light of Cuyler v. Sullivan, supra, the Fitzgerald rule retains no vitality. Ross v. Moffitt, supra, held that the equal protection clause does not require a State to appoint free counsel to indigent defendants seeking discretionary review of their convictions. That is not the issue here.

The District Court here, recognizing its own precedent in Pressley v. Wainwright, 540 F.2d 818, 820 (5th Cir. 1976), cert. denied, 430 U.S. 987, 97 S.Ct. 1688, 52 L.Ed.2d 383 (1977),

WEINER, ROBBINS, TUNNEY & ROSS, P.A., ATTORNEYS AT LAW
RIVERGATE PLAZA, SUITE 700, 444 BRICKELL AVENUE, MIAMI, FLORIDA 33131 • (305) 373-0110

again acknowledged that "the failure of court-appointed counsel to file a timely notice of certiorari in the Florida Supreme Court has been held to constitute ineffective assistance." [App. 4]. Even then, implicitly denying any valid distinction between privately retained and court-appointed counsel, the Pressley Court stated:

> . . . One who agrees to undertake the task of petitioning the Florida Supreme Court for a Writ of Certiorari makes a hollow commitment when he does not exercise care to preserve that right. [540 F.2d at 820, fn. 6].

Expressly relying on this Court's decision in Cuyler v. Sullivan, supra, the District Court correctly concluded that this Court "has made clear there is no distinction between court-appointed and privately retained counsel in the evaluation of a claim of ineffective assistance": [App. 7].

> Our decisions make clear that inadequate assistance does not satisfy the Sixth Amendment right to counsel made applicable to the States through the Fourteenth Amendment.
>
> * * *
>
> A proper respect for the Sixth Amendment disarms Petitioner's contention that defendants who retain their own lawyers are entitled to less protection than defendants for whom the State appoints counsel.
>
> * * *
>
> The vital guarantee of the Sixth Amendment would stand for little if the often uninformed decision to retain a particular lawyer could reduce or forfeit the defendant's entitlement to constitutional protection.
>
> [Cuyler v. Sullivan, at 344-45].

Moreover, as this Court reasoned in Cuyler and the District Court concluded below, "the State's conduct of a criminal trial itself implicates the State in the defendant's conviction." [App. 7]. Because the Sixth and Fourteenth Amendments are offended any time a State defendant is represented by ineffective counsel there can be no basis for drawing a distinction between retained and appointed counsel that would deny equal justice to defendants who must choose their own lawyers.

WEINER, ROBBINS, TUNKEY & ROSS, P.A., ATTORNEYS AT LAW
RIVERGATE PLAZA, SUITE 700, 444 BRICKELL AVENUE, MIAMI, FLORIDA 33131 • (305) 373-0110

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing response to Petition for Writ of Certiorari was furnished by mail to Stephen R. Jacob, Assistant Attorney General, Office of the Attorney General, 401 Northwest 2nd Avenue, Suite 820, Miami, Florida, 33128, on this 14th day of October, 1981.

WEINER, ROBBINS, TUNKEY & ROSS, P.A.

BY: Jeffrey C. Fleck
GEOFFREY C. FLECK

WEINER, ROBBINS, TUNKEY & ROSS, P.A., ATTORNEYS AT LAW
RIVERGATE PLAZA, SUITE 700, 444 BRICKELL AVENUE, MIAMI, FLORIDA 33131 • (305) 373-0110

The decision of the District Court of Appeal, Fifth Circuit, was eminently correct and certiorari should be denied.

WEINER, ROBBINS, TUNNEY & ROSS, P.A., ATTORNEYS AT LAW
RIVERGATE PLAZA, SUITE 700, 444 BRICKELL AVENUE, MIAMI, FLORIDA 33131 • (305) 373-0110

CONCLUSION

This case involves no important question of Federal law. The decision of the Court of Appeals creates no conflict of precedent, whatsoever. It is, in fact, expressly and entirely consistent with this Court's decision in Cuyler v. Sullivan, supra. There are no special or important reasons to disturb the decision of the Fifth Circuit below. This Court's Writ of Certiorari should not issue in this case.

Respectfully submitted,

WEINER, ROBBINS, TUNKEY & ROSS, P.A.
Attorneys at Law
Rivergate Plaza, Suite 700
444 Brickell Avenue
Miami, Florida 33131
Telephone: (305) 373-0110

BY: Geoffrey C. Fleck
GEOFFREY C. FLECK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

NO: 81-362

RECEIVED
OCT 16 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

LOUIE L. WAINWRIGHT, Secretary,
Florida Department of Corrections,

Petitioner,

-vs-

JOSE TORNA,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Pursuant to Rule 46 of the Rules of this Court, Motion is hereby made that the Respondent be allowed to proceed in forma pauperis before this Court for the reasons stated in the attached Affidavit. Leave to proceed in forma pauperis has not been sought in any Court below.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion was mailed to the Office of the Attorney General, 401 Northwest 2nd Avenue, #820, Miami, Florida, 33132, on this the 14th day of October, 1981.

Respectfully submitted,

WEINER, ROBBINS, TUNKEY & ROSS, P.A.
Attorneys at Law
Rivergate Plaza, Suite 700
444 Brickell Avenue
Miami, Florida 33131
Telephone: (305) 373-0110

BY: Geoffrey C. Fleck
GEOFFREY C. FLECK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

RECEIVED
OCT 16 1981

LOUIE L. WAINWRIGHT, Secretary, Florida Department of Corrections,	:	CASE NUMBER: 81-362
Petitioner,	:	
-vs-	:	
JOSE TORNA,	:	
Respondent.	:	
	:	

A F F I D A V I T

I, JOSE R. TORNA, being first duly sworn according to law, depose and say, in support of my Motion for Leave to proceed without being required to prepay costs or fees:

1. I am the Petitioner in the above-entitled case.

2. I am incarcerated and have no means of obtaining money to pay the costs or fees involved in the defense of this action initiated by the Petitioner.

3. I have no savings and because of my proverty I am unable to pay the costs of this cause.

4. I am unable to give security for the same.

5. I believe that I am entitled to the redress I seek in said case.

6. The nature of this case is briefly stated as follows:

I was convicted of numerous felonies and sentenced to fifteen (15) years imprisonment in proceedings had in the State trial court, the Circuit Court of the Eleventh Judicial Circuit of Florida, in and for Dade County. After my conviction and sentence were affirmed on direct appeal, I sought, through my privately retained attorney, redress in the Florida Supreme Court. My attorney failed to file a timely Notice to invoke the certiorari jurisdiction of the Florida Supreme Court and my case was dismissed. Thereafter, I filed a Petition for Habeas Corpus in the United States District Court for the

Southern District of Florida alleging, in addition to other claims, the denial of my Sixth and Fourteenth Amendment rights to the effective assistance of counsel. The District Court rejected my claim, but on appeal to the Fifth Circuit Court of Appeals the District Court's Order of Dismissal was reversed. Now, the Petitioner herein has sought review of the decision of the Fifth Circuit Court of Appeals in this Court by filing a Petition for Writ of Certiorari to which I must now file a Response.

STATE OF FLORIDA)
SS:
COUNTY OF DADE)

JOSE R. TORNA

Duly witnessed and sworn to before me, NOTARY PUBLIC, on this 14th day of September, 1981.

NOTARY PUBLIC, State of Florida at Large

My Commission Expires:

Notary Public, State of Florida at Large
My Commission Expires March 19, 1983
Bonded by American Fire & Casualty Company